Supreme Court, U. S.
FILED
MAR 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1375

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L. FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN W. McGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM MILLER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

JOHN W. CASTLES 3D
STEPHEN J. CRIMMINS
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480
Attorneys for Appellants

RALPH K. WINTER
ROBERT H. BORK
BENJAMIN W. COTTEN
JAMES D. HUTCHINSON
DAVID M. IFSHIN
DONALD IVERS
Of Counsel

MARCH 7, 1980

TABLE OF CONTENTS

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Statement of the Case 3

Statutory Framework 3

Description of Proceedings 4

Ruling Below and Appeal 4

The Questions Are Substantial 4

CONCLUSION 7

APPENDIX—

A. Judgment of the Court of Appeals, *en banc* 1a

B. Opinion of the Court of Appeals, *en banc* 3a

C. Notice of Appeal to the Supreme Court of the United States 6a

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 (1976) 6n

Statutes:

2 U.S.C. §437h ..... *passim*

2 U.S.C. §441a(b)(1)(B) 3, 4

	PAGE
26 U.S.C. § 9003(b)	3
26 U.S.C. § 9004(a)	3
26 U.S.C. §9011(b)	*passim*
28 U.S.C. §1331	2
Legislative History:	
120 Cong. Rec. 10558-62 (April 10, 1974)	5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L. FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN W. MCGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM MILLER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Appellants Republican National Committee, The Ripon Society of New York, Inc., Paul C. Cardamone, and John A. Schmid appeal from a judgment of the United States Court of Appeals for the Second Circuit, *en banc,* entered on February 6, 1980. This judgment (which is printed at Appendix A) upheld the constitutionality of several provisions of the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974, 1976 and 1979, 2 U.S.C. § 431 *et seq.* (hereinafter the "FECA"). It is one of three decisions involving identical issues and parties which upheld certain provisions

of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.* (hereinafter the "Fund Act"), as well as the FECA. Those provisions compel presidential candidates to comply with limits upon campaign expenditures in order to receive general election campaign funding and forbid individual citizens from engaging in a wide variety of political activities requiring personal expenditures in connection with presidential campaigns. The other decisions were by a Three-Judge District Court for the Southern District of New York and by a Single-Judge District Court for the Southern District of New York. A separate Jurisdictional Statement under 26 U.S.C. §9011(b) has been filed this day so as to appeal from the decision of the Three-Judge Court (hereinafter the "Section 9011(b) Jurisdictional Statement"). A writ of certiorari before judgment is being sought to review the decision of the District Court sitting under 28 U.S.C. § 1331.*

In order to avoid undue repetition in this Jurisdictional Statement, portions of the Section 9011(b) Jurisdictional Statement will be incorporated by reference into this Jurisdictional Statement.

Opinion Below

The Opinion below has not yet been reported. The Opinion is printed at Appendix B hereto.

Jurisdiction

The final judgment of the Court of Appeals, *en banc,* was entered on February 6, 1980. The suit is brought under 2

* The jurisdictional provisions which have caused several judgments to be entered are discussed in the portion of the Section 9011(b) Jurisdictional Statement entitled "Description of Proceedings."

U.S.C. §437h. The jurisdiction of the Supreme Court to hear this appeal also rests upon 2 U.S.C. §437h. This appeal is being docketed in this Court within 90 days from the entry of the judgment from which appeal is taken. This appeal should be accorded expedited treatment pursuant to 2 U.S.C. §437h.

This appeal challenges the validity of certain provisions of the FECA. Also involved in this appeal are certain provisions of the Fund Act. The principal provisions at issue are 2 U.S.C. §441a(b) (1) (B) and 26 U.S.C. §§9003(b) and 9004(a). The texts of both the FECA and the Fund Act are printed in the Statutory Appendix to the Section 9011(b) Jurisdictional Statement.

Questions Presented

(1) Do the campaign expenditure limitations imposed by the FECA on presidential candidates who accept public campaign funding under the Fund Act violate those candidates' rights under the First, Fifth and Ninth Amendments to the Constitution?

(2) Do the prohibitions imposed by the FECA on personal expenditures or contributions by individual citizens in support of publicly-funded campaigns violate those individuals' rights under the First, Fifth and Ninth Amendments to the Constitution?

Statement of the Case

Statutory Framework. The statutes involved are fully discussed in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety.

Description of Proceedings. A procedural history of this case is set forth in detail in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety.

Ruling Below and Appeal. The decision of the Three-Judge Court is summarized in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety. The decision of the Three-Judge Court was filed on February 5, 1980. The Court of Appeals, *en banc,* filed its decision on February 6, 1980, holding that "the challenged provision of FECA, 2 U.S.C. § 441a(b) (1) (B), does not violate the First, Fifth or Ninth Amendments of the Constitution, substantially for the reasons set forth in the opinion of the Three-Judge Court filed in the case on February 5, 1980." *

Appellants filed a notice of appeal from the judgment of the Court of Appeals, *en banc,* to take the instant appeal to the Supreme Court. The notice of appeal is printed at Appendix C.

The Questions Are Substantial

The questions raised by this case are identical with those raised by the decision of the Three-Judge Court. The substantiality of the questions raised by this case is discussed in full in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety.

Congress enacted 2 U.S.C. § 437h in order to provide review of precisely the issues raised in this action.

When Congress enacted the 1974 Amendments to the FECA, a provision was enacted mandating expedited direct

* Opinion, p. 2; 5a.

appeal to the Supreme Court of constitutional challenges to the FECA, 2 U.S.C. § 437h. In enacting § 437h, Congress was specifically concerned with the constitutionality of expenditure limits, the very issue raised by this action.

Prior to the passage of the Senate version of the 1974 Amendments, Senator James Buckley offered an amendment to modify the bill to eliminate expenditure limitations. It appeared to a number of Senators during the Senate's consideration of the 1974 Amendments that such limits had already been held unconstitutional by the courts in prior decisions. 120 Cong. Rec. 10558-62 (April 10, 1974) (remarks of Senators Buckley, Nunn and Dominick).

> Mr. Dominick: . . . . Senator [Buckley] brought up a number of cases, over and beyond the three-judge-court case that I referred to, which has already ruled, in effect, that a limitation on expenditures is unconstitutional . . .
>
> Mr. Buckley: I thank the Senator from Colorado. I think that the constitutional aspects of the legislation before us have been almost totally ignored by the press, the Congress, and in most of the discussions we have seen in columns and editorials. Yet, the importance of protecting the first amendment in all its aspects, especially in its political aspects, is so essential to a free society that I urge this body not to be swept into enacting legislation that we will all live to regret; legislation that will most assuredly be found to be unconstitutional once its key provisions are tested.
>
> It is for these reasons that I have offered my amendment.
>
> Mr. Nunn: I understand the Senator's constitutional question, and I think he has performed a real service in bringing it out in clear fashion. I would like to ask, however, what his amendment does.

> Mr. Buckley: Its effect is to eliminate limitations on total expenditures by or on behalf of a candidate. It does not affect the public financing aspects of this bill. It assures that, within the limitations set, all candidates for Federal office will be provided with public campaign funds. My intent is as I indicated in my formal remarks to raise the important constitutional questions that I feel should be answered before we vote on final passage.

120 Cong. Rec. 10562 (April 10, 1974).*

The second part of Senator Buckley's amendment was a provision which ultimately became §437h, providing for review by the Supreme Court of constitutional challenges to the FECA on an expedited basis. At the outset of the debate on his amendment, Senator Buckley requested and received a division on the two provisions so that should the first part of his amendment fail and expenditure limits be enacted there would be an expeditious review by this Court of their constitutionality. Senator Buckley stated that the second provision of his amendment

> . . . merely provides for the expeditious review of the constitutional questions I have raised [*i.e.*, expenditure limits]. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562 (April 10, 1974) (Bracketed material added).

---

* As discussed in the portion of the §9011(b) Jurisdictional Statement entitled "Expenditure Limitations as an Unconstitutional Condition", this Court expressly ruled in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that these Senators were correct in that limits on expenditures are in fact unconstitutional.

The Senate defeated the first part, thus retaining expenditure limits, and adopted the second part providing for expedited review by the Supreme Court of constitutional challenges.

It is, therefore, clear that in enacting § 437h Congress was specifically concerned that the issues raised by this case be heard and considered by this Court in order to avoid having the integrity of a presidential election cast in doubt.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted and the case set for briefing and argument on an expedited basis. Alternatively, action herein should be deferred pending disposition of the appeal from the decision of the Three-Judge Court.

Respectfully submitted,

JOHN W. CASTLES 3d
STEPHEN J. CRIMMINS
LORD, DAY & LORD
25 Broadway
New York, New York, 10004
(212) 344-8480
Attorneys for Appellants

RALPH K. WINTER
ROBERT H. BORK
BENJAMIN W. COTTEN
JAMES D. HUTCHINSON
DAVID M. IFSHIN
DONALD IVERS
Of Counsel

Dated: March 7, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and eighty.

Present:

HON. IRVING R. KAUFMAN, *Chief Judge*
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
HON. JON O. NEWMAN
HON. AMALYA L. KEARSE

Circuit Judges.

79-3073

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Appendix A

This case came before this Court *en banc* pursuant to 2 USC § 437h(a)(sic) to consider the constitutional questions certified by the United States District Court for the Southern District of New York.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the challenged provision of FECA, 2 U.S.C. § 441a(b)(1)(B), does not violate the First, Fifth or Ninth Amendments of the Constitution in accordance with the response to the certified questions.

A. Daniel Fusaro,
Clerk

by: /s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and eighty.

Present:

Hon. Irving R. Kaufman, *Chief Judge*
Hon. Wilfred Feinberg
Hon. Walter R. Mansfield
Hon. William H. Mulligan
Hon. James L. Oakes
Hon. William H. Timbers
Hon. Ellsworth A. Van Graafeiland
Hon. Thomas J. Meskill
Hon. Jon O. Newman
Hon. Amalya L. Kearse

Circuit Judges.

Docket No. 79-3073

Republican National Committee, et al.,

Plaintiffs,

—against—

Federal Election Commission,

Defendants.

Appendix B

In this action in the District Court for the Southern District of New York for declaratory and injunctive relief against enforcement of certain provisions of the Presidential Election Campaign Fund Act, Ch. 95 of Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§9001, *et seq.* ("Fund Act") and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§431, *et seq.* ("FECA") on the grounds that they violate the First, Fifth, and Ninth Amendments of the Constitution, the Chief Judge of this Court, by order entered pursuant to 28 U.S.C. §2284 on November 30, 1978, convened a three-judge court to decide the constitutional issues raised with respect to the Fund Act, as required by §801(b) of that Act, 26 U.S.C. §9011(b), which expressly grants jurisdiction to such a court to "implement or construe" any provision of the Fund Act. The principal provisions of the Fund Act challenged are found in 26 U.S.C. §9003(b) and those of FECA in 2 U.S.C. §441a(b)(1)(B).

The single-judge district court (Gagliardi, D.J.) retained jurisdiction over the claims directed at FECA, advising the parties that it would entertain a motion to certify questions regarding the constitutionality of FECA to this Court sitting en banc, as required by 2 U.S.C. §437h. See 461 F. Supp. 570 (1978). Before certifying the questions, however, the single-judge court, sitting jointly with the three-judge court, held hearings, took evidence, and made findings of fact bearing on the constitutional issues, which were essentially the same as to both statutes, thus following substantially the same procedure as that adopted in *Buckley* v. *Valeo,* 519 F.2d 821 (D.C. Cir. 1975), *aff'd. in part and revd. in part,* 424 U.S. 1 (1976). The "Joint Finding of Fact" of the two courts were filed in the district court on October 15, 1979, and transmitted to this Court by

Appendix B

Judge Gagliardi on the same date with his "Certification of Constitutional Questions" pursuant to 2 U.S.C. §437h(a). Thereafter we requested the parties to submit briefs bearing on the constitutional issues raised with respect to 2 U.S.C. §441a(b)(1)(B) of FECA.

On February 5, 1980, the three-judge court filed its opinion (per Mansfield, C.J.) upholding the constitutionality of the provisions of the Fund Act challenged by plaintiff and directing that the complaint be dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Fund Act.

Having received, reviewed and considered the findings of the district court, the parties' briefs and the opinion of the three-judge court, we conclude, in response to the questions certified to us by the district court, that the challenged provision of FECA, 2 U.S.C. §441a(b)(1)(B), does not violate the First, Fifth or Ninth Amendments of the Constitution, substantially for the reasons set forth in the opinion of the three-judge court filed in the case on February 5, 1980.

[Concurrences noted by Hon. Irving R. Kaufman, *Chief Judge,* Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Hon. William H. Mulligan, Hon. James L. Oakes, Hon. William H. Timbers, Hon. Ellsworth A. Van Graafeiland, Hon. James J. Meskill, Hon. Jon O. Newman, Hon. Amalya L. Kearse]

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 79-3073

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L. FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN W. MCGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM MILLER,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Republic National Committee, the Ripon Society of New York, Inc., Paul C. Cardamone, and John A. Schmid, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the Court of Appeals for the Second Circuit, *en banc,* dismissing the

Appendix C

complaint entered in the action on February 6, 1980.

This appeal is taken pursuant to 2 U.S.C. § 437(h).

Dated: February 19, 1980

/s/ JOHN W. CASTLES, 3d
John W. Castles, 3d
LORD, DAY & LORD
Attorneys for Plaintiffs
25 Broadway
New York, NY 10004
(212) 344-8480

filed 2-20-80

Appendix C

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 1980 copies of the foregoing Notice of Appeal were delivered by first class mail, postage prepaid, to the addresses listed below. All parties required to be served have been served.

Charles N. Steele, Esq. (airmail)
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, DC 20005

Wade H. McCree, Esq. (airmail)
Solicitor General
Department of Justice
Washington, DC 20530

Patrick H. Barth, Esq.
Assistant United States Attorney
One St. Andrew's Plaza
New York, NY 10007

Roger Witten, Esq. (airmail)
Wilmer & Pickering
1666 K Street, N.W.
Washington, DC 20006

/s/ STEPHEN J. CRIMMINS
Stephen J. Crimmins
LORD, DAY & LORD
Attorneys for Plaintiffs
25 Broadway
New York, NY 10004
(212) 344-8480